

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





ORIGINAL

77-1421

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United States Court of Appeals  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*against*

HOWARD WENDY, Esq.,

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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BRIEF FOR APPELLANT

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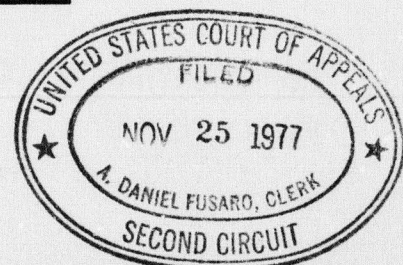




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### INTRODUCTORY STATEMENT

This is an appeal from an Order of Contempt issued by Judge Thomas P. Griesa of the United States District Court for the Southern District of New York wherein defendant, Howard Wendy, Esq., was found in civil contempt of court for failure to proceed with a criminal trial in the matter of United States of America vs. Herven M. Harris (76 Cr. 602) before Judge Gerard L. Goettel on December 13, 1976.

### QUESTIONS PRESENTED

1. Was Mr. Wendy's inability to comply with Judge Goettel's directive to proceed with the trial by reason of Mr. Wendy's inexperience as a trial attorney and defendant's insistance that Mr. Kassner, of the retained firm, try the case a defense to a contempt citation for failure to comply with such directive?

2. Did Mr. Wendy's action with respect to his failure to proceed with the trial before Judge Goettel in the face of the defendant's refusal to permit him to do so warrant a civil contempt citation?

### STATEMENT OF FACTS

Appellant is an attorney at law admitted to practice before the courts of the State of New York, the United States District Court for the Southern District of New York



and the United States Court of Appeals for the Second Circuit.

On or about June 29, 1976, the United States of America filed a criminal indictment against one, Herven M. Harris, wherein Mr. Harris was alleged to have violated the United States tax laws and specifically, 26 U.S.C. §7201. Mr. Harris retained the law firm of Kassner & Detsky, P.C. located at 122 East 42nd Street, New York, New York, to represent him in connection with such indictment. All initial appearances were made by Mr. Howard Wendy of the firm.

On July 8, 1976, Mr. Wendy, accompanied by Mr. Harris, appeared in the United States District Court and entered defendant's plea of "not guilty" to the criminal indictment. Thereafter, on July 9, 1976, and again, on July 19, 1976, a notice of appearance was filed by Kassner & Detsky, as attorneys for Mr. Harris (see Docket Entries; Appendix page 1a). Mr. Wendy had entered his appearance by signing his name on behalf of Kassner & Detsky and the docket sheet reveals the clerk's understanding of such appearance to be that Kassner & Detsky were the attorneys for the defendant. Mr. Wendy was under what might be the misapprehension that that is the proper manner for a firm to enter a Federal Court appearance.

Thereafter, a number of conferences were held before Judge Goettel between Mr. Wendy, the Assistant United



States Attorney and the Court in an attempt to set a date for the trial of the government's action against Mr. Harris. On October 13, 1976, the Court set December 13, 1976 as the date for the commencement of the trial of Mr. Harris.

Mr. Harris, upon retaining the law firm of Kassner & Detsky, to represent him, had specified that Mr. Herbert Kassner, an attorney with extensive trial experience and a reputation as a superior trial attorney, represent him in the criminal trial. On December 8, 1976, Mr. Kassner commenced a criminal trial in the six count felony bribery trial of People of the State of New York vs. Abe Hendy before Justice George Roberts of the New York State Supreme Court. Mr. Kassner had envisioned that the trial would be concluded by December 11, 1976 and accordingly, would therefore be available to represent Mr. Harris at the commencement of his trial on December 13, 1976. Unfortunately, and due to no action on Mr. Kassner's part, Justice Roberts was not able to preside at the trial of Abe Hendy for more than two or three hours a day as he was assigned to a calendar part of the New York State Supreme Court during the mornings of the week of December 8, 1976. This unduly delayed the termination of the trial.

On December 9, 1976, Mr. Wendy advised Paul Vizcarrondo, Esq., the Assistant United States Attorney on the Harris case that Mr. Kassner would not be available to repre-



sent Mr. Harris on December 13, 1976. On December 10, 1976, Mr. Wendy advised Judge Goettel's chambers of this fact and requested an adjournment of the trial of Mr. Harris to a date when Mr. Kassner would be available. Mr. Wendy was advised to be in court on Monday, December 13, 1976, and to be prepared to proceed with the trial.

On December 13, 1976, Mr. Wendy appeared before Judge Goettel and again advised the court that Mr. Kassner was actually engaged in a criminal trial in the New York Supreme Court and requested a one-week adjournment of the Harris trial. Judge Goettel refused to grant Mr. Wendy the adjournment and held Mr. Wendy in contempt of court and fined him the sum of \$500.00 for failure to proceed with Mr. Harris' trial and ordered him to appear the next day for trial. On the following day, December 14, 1976, the parties again appeared before Judge Goettel and Mr. Wendy again stated that the firm of Kassner & Detsky was not prepared to go ahead with the defense of Mr. Harris as Mr. Kassner was still engaged in the trial of the State action. Thereupon, Judge Goettel again found Mr. Wendy in contempt of court and fined him the sum of \$500.00.

In the interim, Mr. Wendy had petitioned the United States Court of Appeals for the Second Circuit for a writ of mandamus ordering Judge Goettel to adjourn the trial of



Herven Harris until such time as Mr. Kassner would be available to proceed with the defense of Mr. Harris. (On December 15, 1976, the Court of Appeals denied the petition without opinion.) On December 15, 1976, the parties again appeared before Judge Goettel who again held Mr. Wendy in contempt of court and fined him the sum of \$500.00 for failure to proceed. At that time, Mr. Vizcarrondo asked the Court to have Mr. Harris indicate that he was unwilling to proceed with Mr. Wendy and then find a waiver of speedy trial by reason thereof. This the Court did by asking Mr. Harris whether he was prepared to have Mr. Wendy represent him or whether he wanted an adjournment of the trial until such time as Mr. Kassner would be available to undertake his defense. Mr. Harris replied that he did not want Mr. Wendy to represent him and wanted an adjournment for the purpose of having Mr. Kassner conduct his defense. Thereupon the court adjourned the trial to January 1977.

Mr. Kassner's trial in People vs. Hendy ended on December 17, 1977.

On January 4, 1977, the trial of Herven Harris commenced. Mr. Harris was represented by Mr. Kassner and was ultimately found not guilty by a jury.

Thereafter, Judge Goettel referred the matter of Mr. Wendy's contempt of court citations to Judge Pollack



of the Reassignment Committee who thereupon assigned Judge Thomas P. Griesa to conduct the contempt proceedings. On August 4, 1977, a hearing was held before Judge Griesa who refused to overturn the decision of Judge Goettel holding Mr. Wendy in contempt of court for failure to proceed with the Harris trial on December 13, 14 and 15, 1976. Thereafter, a written order of contempt, dated September 8, 1977, was signed by Judge Griesa finding Mr. Wendy in contempt of court and fining him the sum of \$1500.00. It is this order of contempt from which Mr. Wendy now appeals to this court.

POINT I

MR. WENDY'S INABILITY TO COMPLY WITH JUDGE  
GOETTEL'S DIRECTIVE TO PROCEED WITH THE  
TRIAL IS A DEFENSE TO A CONTEMPT CITATION  
FOR FAILURE TO COMPLY WITH SUCH DIRECTIVE

Mr. Wendy, an attorney at law, has been held in civil contempt of court as a result of his failure to comply with an Order of Judge Gerard L. Goettel to proceed with the representation of one, Herven M. Harris, in a criminal trial for violation of the United States tax laws on the date scheduled by Judge Goettel for the commencement of such trial. One of the constituent elements of civil contempt for failure to obey an Order of a court is an ability to comply with such Order. Shillitani vs. United States, 384 U. S. 364, 371, 16 L. Ed 2d 622, 86 S. Ct. 1531 (1966); Maggio vs. Zeitz, 333 U. S. 56, 92 L. Ed 476, 68 S. Ct. 401 (1948); United States vs. United Mine Workers, 330 U. S. 258, 91 L. Ed 884, 67 S.Ct. 677 (1947).

In order to determine whether Mr. Wendy had the ability to comply with Judge Goettel's Order, the relationship between the defendant, Harris, Mr. Wendy and the law firm of Kassner & Detsky, P.C., must be considered. Mr. Harris was charged with the criminal offense of tax evasion under 26 U.S.C. section 7201. He retained the firm of Kassner & Detsky, P.C. to defend him against such charge.

Mr. Wendy, who was a member of the firm of Kassner & Detsky, P.C. in June of 1976, has a very extensive tax background. However, he had no experience in trial practice, neither in Federal nor State court and neither Civil nor criminal trial experience (Appendix p. 105a). Herbert



Kassner, Esq., of the firm of Kassner & Detsky, P.C., is a successful and reputable trial attorney who has conducted numerous trials, both civil and criminal. Upon retaining the firm of Kassner & Detsky, P.C. to represent him, Mr. Harris had requested, and had been assured, that Mr. Kassner would actually conduct the trial and present Mr. Harris' defense.

As Mr. Wendy had an extensive tax background and was familiar with the intricate provisions of the Internal Revenue Code, he was assigned by the firm to be present at pretrial conferences before Judge Goettel and to conduct pretrial discovery proceedings. At no time, however, was Harris led to believe that any one other than Herbert Kassner would conduct his defense.

At the conference of October 12, 1976, Judge Goettel had set the date of December 13, 1976 for the commencement of the trial of United States of America vs. Herven Harris. At the time such trial date was set, both Mr. Harris and Mr. Wendy anticipated that Herbert Kassner would be available to conduct Mr. Harris' defense. When the parties appeared in Court on December 13, 1976, Mr. Kassner was not present as he was in the midst of a criminal trial in New York State Supreme Court in a matter of People vs. Hendy. Mr. Harris was therefore accompanied by Mr. Wendy.

As appears from the transcript of the proceedings of December 13, 1976 (Appendix pgs. 32a-43a), Mr. Wendy advised the Court of the unavailability of Mr. Kassner and of his own lack of qualifications to act as trial attorney, that he had never tried a tax case and that he did not feel competent to try Mr. Harris' case (Appendix p. 35a).

Not only did Mr. Wendy believe that he would be doing a great disservice to his client should he undertake to act as trial counsel, but

Mr. Harris, the defendant who would be subject to a jail term should the jury convict him of the offense charged in the indictment, refused to have Mr. Wendy represent him (Appendix pgs. 86a-87a). Therefore, even had Mr. Wendy believed himself capable of providing adequate representation of Mr. Harris, he would not have been able to do so as Mr. Harris was opposed to having anyone defend him other than Mr. Kassner, who was then actually engaged in a State Court proceeding.

"The sound discretion of an equity Court does not embrace enforcement through contempt of a party's duty to comply with an Order that calls him 'to do an impossibility' (citing Maggio vs. Zeitz, supra)... it would be unreasonable and unjust to hold in contempt a defendant who demonstrated that he was powerless to comply." Natural Defense Counsel, Inc. vs. Train, 510 F. 2d 692 (C.A.D.C. 1975)

In the case at bar, Mr. Wendy was cited for civil contempt of Court for failure to obey Judge Goettel's Order to proceed with the trial even though Mr. Harris expressly stated that he was not prepared to proceed with Mr. Wendy as his counsel. Assuming, arguendo, that Judge Goettel had the right to direct Mr. Wendy to conduct Mr. Harris' defense in the face of Mr. Wendy's confessed lack of qualifications to conduct a criminal trial, Mr. Wendy was not able to comply with Judge Goettel's Order. It would, therefore, be unreasonable and unjust to hold Mr. Wendy in civil contempt of court where his ability to comply with the court's Order was thwarted by Mr. Harris' wishes.

Unlike criminal contempt, which is punitive in nature, civil contempt is remedial in nature. Danielson vs. United Seafood Wkrs. Smoked F. & C.U., 405 F. Supp. 396, 403 (S.D.N.Y. 1975). The purpose of a civil contempt Order is to force the defendant to comply with a Court's Order or directive. Under such circumstances, the Court must consider "the character



and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the desired result." United States vs. United Mine Workers, supra, 330 U.S. at page 304. In the instant case, no sanction that the Court could have imposed on Mr. Wendy, whether financial or otherwise, could have induced Mr. Wendy to comply with the Court's directive to proceed with the trial in the face of Mr. Harris' refusal to permit Mr. Wendy to represent him. Mr. Wendy was put in a "no-win" situation. He could not comply with the Court's Order because the client refused to permit him to act as trial counsel. Yet, by failing to comply with the Court's Order, he was subjecting himself to sanctions which the Court had stated would be imposed on him, individually, for failure to proceed with the trial. Under such circumstances, it is submitted, a civil contempt Order against Mr. Wendy is inappropriate and unjust.

POINT II

MR. WENDY'S ACTIONS WITH RESPECT TO HIS FAILURE  
TO PROCEED WITH THE TRIAL BEFORE JUDGE GOETTEL  
DID NOT WARRANT A CIVIL CONTEMPT CITATION

In considering whether Mr. Wendy's actions warranted a contempt citation and the imposition of a fine against him, we start with the premise that "a Court cannot deprive attorneys of their liberty or property in order to avert perceived threats to the administration of justice if the Court's action would unduly impair legitimate nondisruptive advocacy. In any case wherein the record reveals no facts supporting the challenged contempt conviction, the adjudication cannot stand." Weiss vs. Burr, 484 F. 2d 973, cert. denied, 414 U.S. 1161 (9th Cir. 1973); citing In re McConnell, 370 U.S. 230, 8, L. Ed 2d 434, 82 S. Ct. 1288 (1952). It is, therefore, appropriate to consider whether the sum of all of Mr. Wendy's actions as revealed by the record constitutes sufficient grounds to hold him in civil contempt of Court.

As appears from the transcript of the proceedings before Judge Goettel on December 13, 1976 (Appendix pgs. 32a-43a), the grounds for finding Mr. Wendy in contempt of Court were: (a) that Mr. Wendy had entered a personal appearance as attorney for defendant, Harris, and (b) that Mr. Wendy had conducted all pretrial conferences. With respect to the first ground, the docket entries made by the Clerk of the District Court clearly indicate that the attorneys for Herven Harris were Kassner & Detsky and that the notices of appearance filed on July 9, 1976 and July 19, 1976 were filed by Kassner & Detsky as attorneys for defendant (Appendix p. 1a). Although Mr. Wendy may have incorrectly signed the notices of appearance



"Howard Wendy, Attorney for Defendant" of the firm of Kassner & Detsky (Appendix pgs. 4a-5a) instead of "Kassner & Detsky, P.C., Attorney for Defendant by Howard Wendy", it appears that the Clerk was not confused by the subscription on the notices of appearance and considered said notices to be filed by the firm of Kassner & Detsky as attorneys for Mr. Harris. Indeed, the only notation on the docket sheet of Mr. Wendy's involvement in this case is an entry of July 8, 1976 indicating that Howard Wendy had accompanied the defendant at the time the defendant entered a plea of "not guilty" (Appendix p. 1a).

As far as Mr. Wendy having conducted the pretrial conferences in the Harris case, it has been pointed out above that Mr. Wendy had an extensive background in tax law and therefore, it was highly appropriate for him to conduct the pretrial discovery proceedings and attend pretrial conferences in connection with a case wherein a criminal violation of the tax laws was alleged. It is submitted that it is not uncommon for one attorney to handle the pretrial aspects of the case and another attorney to act as trial counsel. At no time during any of the pretrial conferences before Judge Goettel did the Court inquire as to who would be trial counsel, and since both Mr. Harris and Mr. Wendy had anticipated that Mr. Kassner would be available to conduct the trial, there was no reason for Mr. Wendy to inform the Court at an early date of the name of the attorney who would act as trial counsel.

From October 12, 1976, the date on which Judge Goettel set December 13 as the date for the commencement of the Harris trial, until December 8, 1976, neither Mr. Wendy nor Mr. Kassner had any reason to believe that Mr. Kassner would not be able to proceed with the Harris trial on December 13. It was only on December 10, 1976 that it became



apparent that Mr. Kassner would not be able to try the case on Monday, December 13. On that date, Mr. Wendy advised Judge Goettel's chambers that Mr. Kassner would be unavailable on December 13 and requested an adjournment of the Harris trial.

It appears that Judge Goettel relied on the case of In re John Joseph Sutter 543 F. 2d 1030 (2d Cir. 1976) as the basis for fining Mr. Wendy \$500.00 a day for his failure to proceed with the Harris trial (Appendix p. 35a). Both the facts of the Sutter case and the law upon which this Court affirmed the District Court's Order assessing costs upon the attorney involved therein are distinguishable from the case at bar. In the first place, the imposition of costs against counsel in Sutter for failure to proceed with a trial on the date set by the trial judge, was made pursuant to Rule 8(b) of the Individual Assignment and Calendar Rules of the United States District Court for the Eastern District of New York, whereas Mr. Wendy was fined the sum of \$1500.00 for being in civil contempt of Court. This Court, in Sutter, expressly declined to consider the question of whether Mr. Sutter's conduct was contemptuous. In re Sutter, Supra, Footnote one, 543 F. 2d at page 1032. Secondly, Mr. Sutter's failure to proceed with the trial in the District Court resulted from his own participation in a trial in the State Court which had not been terminated on the date set for the commencement of the District Court trial. In the instant case, it was Mr. Kassner who was on trial in the State Court and yet, it was Mr. Wendy who was held in contempt of court for Mr. Kassner's failure to appear on December 13.

Furthermore, unlike Sutter where the attorney, aware of possible conflict, did not inform the District Court judge sufficiently in advance



of his participation in a State Court trial and of the possibility that he could not proceed with the District Court trial on the scheduled date, Mr. Wendy advised Judge Goettel of Mr. Kassner's unavailability as soon as he was aware of Mr. Kassner's difficulties in terminating the State Court trial. Moreover, when Mr. Wendy called Judge Goettel's chambers on December 10, 1976 and requested an adjournment of the Harris trial for a period of one week, this was the first time that an adjournment had been requested. Unlike the case of In re Niblack, 476 F. 2d 930, cert. denied, 414 U.S. 909 (1973), where the attorney was repeatedly warned about arriving late and was found in contempt of court for being absent from the courtroom at the time set for his appearance, no prior warnings had been given to Mr. Wendy or Mr. Kassner in this case, nor indeed had they ever given the Court any cause for criticizing or disapproving their actions as attorneys.

Mr. Harris was charged with a felony offense for which he faced a jail term should he have been convicted of such offense. Mr. Wendy's sole concern, as appears from the record of the proceedings before Judge Goettel, was that his client be afforded the best possible representation in defending himself against the government's indictment. As such, his conduct did not evidence a reckless disregard for his professional duty, nor did he manifest any disrespect for the Court. United States vs. Delahanty, 488 F. 2d 396, 400 (6th Cir. 1973); Sykes vs. United States 264 A. 2d 894, 444 F. 2d 928, (C.A.D.C. 1971).

The worst that can be said of Mr. Wendy's actions in conducting himself as an attorney at law and as an officer of the Court is that because he was unfamiliar with the techniques of trial practice and with the procedures of the District Court for the Southern District of New York,

he committed certain errors of judgment. This Court has stated that "attorneys should not be disciplined by financial reprisal for conduct attributable to a mistake, inadvertence or error of judgment". In re Sutter, supra, 543 F. 2d at page 1035.

It is submitted that the actions, or inactions, of Mr. Wendy simply do not rise to the level of contempt. No disrespect of the Court was intended and, as evidenced by the record, Mr. Wendy's action did not evidence a reckless disregard for his professional responsibilities. Accordingly, the Order of Contempt signed by Justice Griesa should be vacated.

CONCLUSION

THE CONTEMPT ORDER OF THE DISTRICT  
COURT SHOULD BE VACATED.

Respectfully submitted,

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Of Counsel

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(212) 490-3960



United States Court of Appeals  
for the Second Circuit

United States of America,  
Plaintiff-Appellee,  
against  
Howard Wendy,  
Defendant-Appellant.

**AFFIDAVIT  
OF SERVICE**

STATE OF NEW YORK,  
COUNTY OF NEW YORK, ss.:

Stan Miller

, being duly sworn, deposes and says that he  
is over the age of 18 years, is not a party to the action, and resides  
at 1405 College Avenue, Bronx, New York

That on November 25, 1977, he served 1 copies of Appendix  
and 2 copies of brief on

Robert B. Fiske, Esq.,  
US Attorney for the Southern District,  
1 St Andrew Plaza,  
New York, New York.

by delivering to and leaving same with a proper person or persons in  
charge of the office or offices at the above address or addresses during  
the usual business hours of said day.

*Stan Miller* .....

Sworn to before me this

25 day of November, 19 77.

*John V. Westphal*  
JOHN V. WESTPHAL  
Notary Public, State of New York  
No. 80-0932350  
Qualified in Nassau County  
Commission Expires March 30, 1979